BRIEF FOR PETITIONER.

1.

Where a state statute regulates the practice of medicine and provides for the issuance of general and minor specialists' licenses which shall have equal standing in the eyes of the law, is the action of the Bureau of Medical Licensure in arbitrarily restricting the practice of the specialties, and a discriminatory classification a violation of the fourteenth amendment of the Federal Constitution?

The Constitution of the United States of America, Art. XIV, sec. 1, *inter alia,* pyovides:

Sec. 1. * * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It was admitted at the trial that Harvey M. Allison, the petitioner herein, had issued to him by the State of Pennsylvania through the Bureau of Medical Education and Licensure a certificate licensing him to act as a physician and to treat the sick by the use of herbs and massage.

This certificate is still in force and effect.

There is no relationship between herbs and massage. Massage is a branch of physiotherapy and not related to the practice of the use of herbs. Gould's Medical Dictionary, Edition IV.

The Commonwealth of Pennsylvania, through its Department of Public Instruction, Bureau of Medical

Education and Licensure, arbitrarily insists that Harvey M. Allison, petitioner, is a physiotherapist.

The Commonwealth of Pennsylvania, by virtue of the Act of June 3, 1911, P. L. 639, as amended by the Act of August 6, 1941, P. L. 903, indicted the said petitioner for practicing medicine and surgery without first having fulfilled the requirements of the Act.

The Commonwealth of Pennsylvania by virtue of the Act of June 3, 1911, P. L. 639, as amended by the Act of July 25, 1913, P. L. 1220 (quoting in part the last subparagraph of paragraph 5) provides the qualification and requirements for physiotherapists. They are examined and upon successful passage: "The Bureau of Medical Education and Licensure of the Department of Public Instruction shall forthwith issue a State certificate to the applicant, limited to the practice of his or her pursuit in this State, this fact being plainly stated across the face of the certificate.

The Bureau of Medical Licensure composed of professional competitors, then arbitrarily and without statutory authority, limits the physiotherapists in their calling and profession—they cannot prescribe, diagnose, or treat patients unless under the direction of a person duly authorized to prescribe the same—a medical doctor.

To which we answer:

The right and license granted to a physiotherapist is a property right. It cannot be arbitrarily abridged, removed or destroyed.

The Supreme Court of the United States of America has said:

> "The right to follow a legitimate calling for any lawful purpose is sacred and is protected both by

> the Constitution of the United States and that of this Commonwealth (Kansas). The right of a physician to toil in his profession as well as that of all other citizens to labor in their chosen work is both liberty and property, partaking of the nature of each, and is guaranteed by constitutional mandate from unwarrantable interference.
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> *Coppage v. Kansas,* 236 U. S. 1.

The Act of June 3, 1911, P. L. 639, as amended by the Act of July 25, 1913, P. L. 1220, Paragraph 5, provides: "* * * Such a system of special licensure being once established, it shall thereafter be unlawful for any person or persons to practice said system in this State without the said State certificate." * * * "A record of all persons so licensed shall be kept in the archives of the Department of Public Instruction, and shall have the standing, before the law, of any other license issued by the Bureau of Medical Education and Licensure. * * *."

In view of the strict mandatory intention and instruction of the people of this Commonwealth acting through their duly elected representatives, this law was passed and created.

It is engraved on the Statute books.

In contradiction to the specific mandate and contrary to their oaths of office, the Bureau of Medical Education and Licensure has arbitrarily destroyed these licenses—by limiting, restricting, and depriving them of their livelihood. They cannot prescribe, diagnose, or treat the sick except by the benevolence, charity or direction of a medical doctor.

We respectfully maintain that the laws should be applied and carried out as they are on the books, and not on the biased, benevolent and discriminatory interpretation of a Bureau of professional competitors.

We maintain and respectfully submit that the Commonwealth of Pennsylvania is the party in interest.

> "Where a State has conferred power upon some one of its agencies to perform a certain function involving the exercise of discretionary power, the performance of such function within the grant, although obnoxious to the laws of the state, is none the less the act of the state within the contemplation of the guaranty of this amendment."
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> *San Francisco Gas, Etc., Co. v. San Francisco,* 189 Fed. 943.

We maintain further that the regulation and license of medicical doctors, allopaths, aclectics, homeopaths, herbalists, physiotherapists, heliotherapists, spondolotherapists, surgeons, mechanotherapists, etc., has been established by the Act of 1911 as amended. They are physicians. They operate and are regulated by the same conditions are are persons similarly situated. Our Pennsylvania Statute, the Act of 1911, as amended, section 6, provides that they "shall have the standing before the law of any other license issued by the Bureau of Medical Education and Licensure."

They shall be of equal dignity and commensurate authority.

Equality: "The equality guaranteed by * * * this amendment is equality under the same conditions and among persons similarly situated."

> *San Bernardino County v. Way,* 1941, 117 P. 2nd 354, at 361, 362.

Further: "Equal protection of the laws, within constitutional guaranty, means that the law must deal alike with all of a given class within jurisdiction to which law is applicable."

Sims v. Rives, 84 F. 2d 871, at 878.

Further: Under this clause, laws of the state must apply equally to all persons in same or similar situation."

Joseph S. Finch Co. v. McKutrick, 59 S. Ct. 256; 305 U. S. 395 at 397.

And to the above we respectfully submit the following:

> "Law which is administered unequally so as to make unjust and illegal discriminations between persons in similar circumstances is violative of this amendment, notwithstanding that the law is fair and impartial on its face."
>
> *Richey v. Wells,* 166 So. 817, at 818.

If a law is so applied and administered as to make unjust discrimination between persons in similar circumstances, material to their rights, such denial of justice violates this clause."

Howard Sports, etc., v. Weller, 18 At. 2d 210.

As to the XIV amendment generally:

> "The prohibitions of this section have reference to State action exclusively."
>
> *Virginia v. Rives,* 100 U. S. 313.

Rights under this amendment turn on the power of the state, no matter by what organ it acts."

Missouri v. Dockery, 191 U. S. 170.

These provisions have reference to actions of the political body denominated a state, by whatever instru-

ments or in whatever modes that action be taken. * * * No agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty, without due process of law or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state power his act is that of the state.

1. *Ex parte Virginia,* 100 U. S. 347.
2. *Home Telephone Co. v. Los Angeles,* Cal. 1918, 33 S. Ct. 312, 227 U. S. 278.
3. *Chicago R. Co. v. Chicago* (1897), 166 U. S. 234.
4. *Scott v. McNeal,* 134 U. S. 45.
5. *Louisville R. Co. v. Bosworth,* 250 F. 191.
6. *Louisville R. Co. v. Railroad Commission,* 191 F. 757.
7. *Risley v. Utica, (N. Y.),* 173 F. 502.

This inhibition upon the state applies to all the instrumentalities and agencies employed in the administration of government.

Ho Ah Kow v. Nunan, (Cal.), 5 Sawy, U. S., 552; 12 Fed. Cas. 6546.

The testimony discloses that the petitioner had been practicing for 43 years as of the date of taking testimony which was December 14, 1943. This petitioner was duly admitted as a physician and a license was issued to the said petitioner on January 21, 1915, granting him the right to practice two branches of medicine, massage and herbs. The said certificate of licensure is still in full force and effect and has not been revoked.

There are certain old Pennsylvania decisions relative to acts impairing vested rights and liberties of citizens, and which have been cited in connection with provisions of the fourteenth amendment to the United States Constitution:

A retroactive act which merely affects a remedy is constitutional.

Keene's Appeal, 64 Pa. 268 (1870).

But an act which directly tends to destroy a right already vested is unconstitutional and void.

1. *Shonk v. Brown,* 61 Pa. 320 (1869).
2. *Alter's Appeal,* 67 Pa. 341 (1871), affirming 7 Phila. 529.
3. *Western Massachusetts Insurance Co. v. Girard P. S. Co.,* 6 Pa. Super. 288 (1898).

We, therefore, submit that the action of the regulatory body, the Bureau of Medical Education and Licensure in arbitrarily restricting physiotherapists—licensed physicians—is an unequal and illegal administration of the Act of 1911. We further submit that the action of the Board in restricting physiotherapists in their pursuits for which they have been licensed is an abridgement of the privilege of a licensed physiotherapist, a deprival of a property right of a licensed therapist and is a denial of the equal protection of the laws.

In conclusion, the petitioner, Harvey M. Allison, is not a physiotherapist exclusively. He has been granted the right to treat the sick by the use of herbs.

He is a herbalist, a botanic physician (Gould's Medical Dictionary).

And by the certificate—assuming he was a physiotherapist—he was exempted. The certificate in plain

English states: "The license issued to those practicing Massage and Allied Branches (and this certainly means physiotherapists) will not confer the right to apply treatments * * * nor will it authorize the holder to practise * * * any drugless method not specifically mentioned on the license."

Those who practice massage and Allied Branches, must pass the moral and educational requirements, take an examination, a certificate is then issued by the State and then they cannto practice as of themselves.

The petitioner has a dual license and by the terms of the license in addition to the restricted right to practice physiotherapy, there is granted the right to use herbs.

At the time the Act of 1911 was passed, pharmacy, dentistry, osteopathy, or any other drugless method came within the purview and jurisdiction of the administrative body issuing medical licenses. It could have been possible under the same certificate to grant to the holder in addition to Massage the additional right to practice osteopathy, pharmacy, dentistry, or any other drugless method.

Now, it could not be argued that a dentist, an osteopath, or a pharmacist, in order to practice his profession, must do so only "upon request of a person duly authorized to prescribe the same."

Therefore, if the designated group are excepted, and the petitioner herein, has been granted a drugless method; namely herbs, it necessarily follows that he, too, is excepted and not subject to the supervision of his professional competitors — the Bureau of Medical Licensure.

This arbitrary procedure in denying the petitioner his right to practice his profession is a denial of the equal protection of the laws—and a violation of the Fourteenth Amendment of the Federal Constitution.

The judgment should be reversed.

Respectfully submitted,

J. HARRY PERSHING,
Attorney for Petitioner.

2. Opinion of the Superior Court of Pennsylvania.

In the Superior Court of Pennsylvania. No. 162 April Term, 1944. Commonwealth of Pennsylvania v. Harvey M. Allison, Appellant, Appeal from the sentence and judgment of the Court of Quarter Sessions of Allegheny County at No. 166 December Sessions, 1942. No. 196 filed July 15, 1944.

OPINION BY KENWORTHY, *J.*

In 1915 the Bureau of Medical Education and Licensure[1] issued to appellant a limited license which conferred upon him "the right to treat the sick by Herbs and Massage * * * upon request of a person duly authorized to prescribe the same." He has twice previously been shown to have exceeded the authority granted by this license and been convicted of engaging in the practice of medicine and surgery, of assuming the title of doctor of medicine and surgery and of diagnosing and treating diseases without having first fulfilled the requirements of what is now known as the Medical Practice Act.[2] Both convictions were upheld by this Court.[3]

Either appellant has no respect for the law or he is mentally incapable of understanding the limitations im-

plicit in the form of license he possesses. For, not only did the Commonwealth show that at the times charged in the indictment, appellant accepted patients, examined them, diagnosed their ailments, prescribed treatments; he glibly admitted these practices from the witness stand. And there is not even the pretense that he limited his patients to those referred for treatment by a properly licensed physician; in fact, one has the impression from reading his testimony that he regards all orthodox physicians and surgeons as either fools or knaves and will have little or nothing to do with them.

Having twice appealed to us in vain one would expect that in this, his third appeal, the ingenuity of counsel, challenged by almost overwhelming odds, would produce a somewhat novel approach to the problem. We have not been disappointed.

It is now contended that in restricting appellant to the treatment of patients referred to him by licensed physicians, the Bureau of Medical Education and Licensure—composed, according to him, of "professional competitors"—has arbitrarily discriminated against him; that there is no statutory authority for such a narrow limitation on his authority and that it contravenes the Fourteenth Amendment to the Federal Constitution.

True, there is no express statutory authority for the particular limitation complained of. The Act, by Sec. 6, (63 PS 408), gives to the Bureau broad, discretionary powers to establish a system of special licensure and to issue to persons who fulfill such qualifications as the Bureau shall provide a license to practice one or more of the limited branches of medicine or surgery. The Constitutionality of the legislation has been passed upon and upheld. Long v. Metzger, 301 Pa. 449, 152 A.

572, and cases cited. Of necessity the Bureau may make discriminations; they are inherent in the nature of the function it performs. Yet we must grant that the acts of the Bureau may always be subjected, by one affected, to the test of reasonableness under the Fourteenth Amendment. But, so far from being unreasonable, the requirement that practitioners of this kind should treat patients only at the request of and hence under some supervision by, a licensed physician is a necessity if the public is to be adequately protected against exploitation.

Appellant is a quack of the worst sort. It is easy to see why if he were compelled to wait for patients referred to him by physicians, he would have no practice. There was no proof of the chemical ingredients of the pills and nostrums he sold to his patients, nor of the type of the massage he employed. But the miracles he professed to be able to accomplish would make the witchery of the Middle Ages seem by comparison an infant and underdeveloped craft. He professes to be a "bloodless surgeon, a botanic physician." When asked how he would cure a case of appendicitis, he said: "That is very easy. That would be cured in one hour's time ordinarily without shedding any blood or making any incision or like that. That is easily cured in one hour and a patient is ready to go to work in one hour." Asked what he would do with a ruptured appendix, he said: "Why, my friend, I have been practicing forty-three years and I have yet to see the physician that has ever saw a ruptured appendix." He could remove diseased tonsils "without cutting": "By the use of herbs taken internally and massage to the throat, cure any case of tonsils, just—well, I'll say within a week or so." He professed to have cured many cases of cancer and as for paralysis: "Oftentimes paralysis is caused by an

obstruction of circulation and by removing that obstruction in a few minutes' time the party has full use of their arms or legs." It makes one shudder to think that a man like this should be entrusted with any part of the responsibility for the diagnosis or treatment of human disease. The story of this case is more persuasive than any abstract argument could possibly be of the wisdom of the Bureau in limiting such practitioners to treatments requested by licensed physicians.

The remaining contention—that this proceeding should have been brought under sec. 6 rather than sec. 2 of the Medical Practice Act as amended—was made and decided adversely to appellant in his first appeal, 103 Pa. Superior Ct. 140.

The judgment is affirmed, and it is ordered that appellant appear in the Court below at such time as he may be there called and that he be by that court committed until he has complied with his sentence or any part of it that had not been performed at the time the appeal was made a supersedeas.

Note 1. Now known as The State Board of Medical Education and Licensure. Act of April 9, 1929, P. L. 177, art. 11, 202, as amended by the Act of May 21, 1943, P. L. 496, 71 PS 62.

Note 2. Act of June 3, 1911, P. L. 639, as finally amended by the Act of August 6, 1941, P. L. 903, 63 PS 401 *et seq.*

Note 3. *Com. v. Allison,* 103 Pa. Superior Ct. 140, 156 A. 812; *Com. v. Allison,* 132 Pa. Superior Ct. 606, 1 A (2d) 920.

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3. Oral Charge of the Court (Court of Quarter Sessions of Allegheny County, Pennsylvania). Park, J.

Members of the Jury:

The defendant in this case, Harvey M. Allison, is indicted on a charge of practicing medicine without a license. That indictment was found at No. 166 December Sessions 1942, and that means that this case was the one hundred sixty-sixth case presented to the December Grand Jury which met the first Monday of December last year. Now this offense constitutes a misdemeanor. In Pennsylvania we have two types of offenses, misdemeanors and felonies. In any misdemeanor case the Court may instruct the jury as to the disposition of the costs under certain circumstances. In other words, in case you find the defendant not guilty, in all misdemeanor cases you must dispose of the costs and in disposing of the costs you may place them upon the defendant, or you may place them upon the prosecutor, a public officer, R. F. Davis, or you may divide them in any proportion you may see fit between the prosecutor and the defendant, or you may place all of the costs upon the County. You cannot divide between the County or either party to the suit. But you must bear this in mind, you do not reach the question of costs until you have first passed upon the guilt or innocence of the defendant. You first determine in your verdict whether you find the defendant guilty then the costs follow that verdict. You will find that you will be instructed in the disposition of costs in all misdemeanor cases but that must not mislead you in this case or in any other case and make you believe it is a question of the disposition of costs only, because you first pass upon

the guilt or innocence of the defendant and then if you find him not guilty you dispose of the costs.

This defendant, as do all defendants coming into the Criminal Court in the State of Pennsylvania, comes into Court presumed to be innocent. In other words, the burden of proof is upon the Commonwealth to establish his guilt; it is not upon the defendant to establish his innocence. That burden upon the part of the Commonwealth must be met by evidence which satisfies you beyond a reasonable doubt. Reasonable doubt has been defined to be such a doubt as fairly arising out of the evidence or lack of evidence would cause a prudent, careful person to hesitate to convict. It must arise out of the evidence or lack of evidence and must be such a doubt as appeals to reasonable persons. It does not mean mental hesitation arising out of a fear of the consequences of your verdict, because that is not a doubt, that is mere timidity. It must not be something fancied or conjured up in your mind to escape what may seem to you to be an unpleasant duty but it must be reasonable and rational. A reasonable doubt exists when a careful consideration of all the evidence leaves in the mind an honest difficulty in believing, when the evidence by reason of its insufficiency or want of credibility fails to convince, but if a jury is so convinced by the evidence that he or she would venture to act upon that conviction in matters of concern of the highest importance to his or her own interests, then there is no reasonable doubt in his or her mind.

Your verdict must not be based upon prejudice which you might have against this defendant or which you might have against any witness produced by either side in the case, nor must it be based upon any sympathy

which you might have for this defendant or for any witness to the case, but it must be based upon your solid findings of fact, because you are the sole judges of the facts. Upon your shoulders rest the burden of determining what the facts are in this case or in any other case in which you sit as jurors. You are the sole judges of the credibility of the witnesses called. When I speak of credibility of witnesses I mean the believability of witnesses. I have often thought that if jurors could just divorce from their minds the fact that they are in a Court room as jurors and just weigh the testimony of various witnesses as you would in your own home, if you are a housewife, or in your business, or your factory, or your place of ordinary employment, and just apply the same common sense you apply in your every day life and give weight to the testimony that you believe is entitled to be weighed and disregard testimony which you feel is of no value and determine your verdict on that basis, that would work out quite satisfactorily because once you have determined the credibility of witnesses, in most cases you have determined your verdict. There is one rule which may be of benefit to you in arriving at what witnesses you believe, or are believable or credible. You must take into consideration the interest which a witness has in the outcome of your verdict. Has that interest influenced his or her testimony? Has that interest caused him or her consciously or unconsciously to color their testimony? Of course, if you find a witness has come before you and deliberately told you something which was untrue, you are justified in ignoring that much of the testimony which you believe to be untrue or you may, if you see fit, ignore all of that testimony. Credibility is a matter for you to determine. Another measuring rod is the

manner of testifying. Did the witness appeal to you as one who is attempting to tell the truth, or did the witness appeal to you to have been one who is evasive and making an effort not to answer the questions? When I speak of manner of testifying I do not mean whether they were nervous or did not know but just the general impression of the manner in which they gave their testimony made upon you.

And then the third rule you might apply to the testimony of various witnesses is the probability of their story, whether their testimony appealed to you as that of reasonable people possessing ordinary common sense, whether their testimony seemed to you to be probable or not.

All those things, if applied, will be of benefit to you in arriving at the credibility of witnesses.

Now, in this particular case there does not seem to be a great deal of contradiction as to the testimony. That, however, is a matter for you to determine and if you do find any contradiction then you should first try to reconcile that, that is try to fit it together, that is dovetail it together, and if you are unable to do that then determine which is the credible or unbelievable testimony and which is not, and base your verdict, of course, upon what you think to be the believable testimony. I am not going to refer in any detail to the testimony which has been given here in the case because it has not been extremely long or complicated and you have heard it recently. It is your recollection of the testimony which must govern you in arriving at your verdict, not the recollection of the Court nor the recollection of either of the eminent counsel in the case. Twelve heads in the jury box are better than one head

on the bench, and your combined recollection is bound to be more accurate than the recollection of any of the Counsel or the Court. This defendant is charged with practicing medicine without a license and the testimony of the investigator for the State, Dr. Davis, was to the effect that, I believe on October 15th, he went to the office of the defendant located on Madison Avenue, if I remember correctly, over in the Twenty-third Ward of the City of Pittsburgh, and that he there asked the defendant to examine him. He tells you of a sign in the window, which I believe was offered in evidence here but which the Court did not see, "Dr. H. M. Allison". He tells you of the defendant taking a stethoscope which is offered in evidence, and listening to his heart, and he tells you generally of the diagnosis which was made by the defendant at that time and of the medicine which was furnished him, that is pills, "Movers" pills, and this liquid. Now, we have no analysis of that medicine, and we do not know what it contains. We do not know whether the investigator took any of it or not. I believe he was accompanied on his first trip by his wife, on October 15th. He went back later, some time in November, accompanied by Mr. Strauch, I believe his name is, a County Detective, and also accompanied by Mr. Stack, Joe Stack, who remained on the outside until he was called into the doctor's office. He tells you that on that day in November—I have forgotten the exact date—the doctor again examined him with the stethoscope and told him there had been no improvement in his condition but for him to continue the treatment. I believe the investigator testified that he had forgotten to bring back the bottle and the doctor told him he could get him another bottle and did sell him another bottle of this medicine contained in those small bottles which

were offered in evidence. Also, I believe on the first visit there the defendant instructed or told the investigator not to use any dairy products, no milk or cheese or butter or anything of that kind, explaining something about syphilis or something in cows. That is a matter for you to pass upon. I was born and raised on a dairy farm and it was a little bit new to me, but that is a matter for you to determine. Now, that is substantially and quite briefly the testimony of the Commonwealth and that is corroborated as far as the witnesses can go by the testimony of Mrs. Davis, corroborated by the testimony of Mr. Strauch with respect to the visit on that day in November, and corroborated by the testimony of Joe Stack, County Detective Stack, as to the part he witnessed and saw on the visit in November.

The doctor took the stand, that is the defendant, and produced here a photostatic copy of his license issued to him in 1914 by the Board having under the Act of 1911 the power to issue licenses to physicians and various people who are required to have licenses to operate certain lines of work in the State of Pennsylvania. I say to you as a matter of law that that Board for the licensing of physicians, as a matter of fact, is not a Board created for the protection of physicians. It is an Act passed for the protection of the public, because anybody that can comply with the requirements is entitled to a license and one who cannot meet the requirements is not entitled under the Act to a license and, of course, that is very clear to any of us. It is done for the protection of the public against the licensing of those who are not fitted by their training or education to practice, particularly in the line of medicine, the art of healing. This license which was introduced here in evidence is a license giving the right to

treat the sick by herbs and massage. The license is issued to those practicing massage and its allied branches. Those allied branches, as I understand it, would be the various therapies, like electricity and so on, heat and light—not herbs, however—and will not confer the right to apply any of these treatments except upon the request of a person duly authorized to prescribe the same.

Now, I want to read just a couple of clauses from the Act on page 905, paragraph "C", section 1: "The term 'Medicine and Surgery' as used in this Act shall mean the art and science having for their object the cure of diseases of, and the preservation of the health of, man, including all practice of the healing art with or without drugs, except healing by spiritual means or prayer." Now, there is no definition that I can find in the Act on drugs but a general definition is, in its broad sense, any substance derived either from animal, vegetable or mineral sources, used by itself or in connection with other ingredients for medicinal purposes. Section "D" of the Act reads: "The term 'Healing Art' as used in this Act shall mean the science of diagnosis and treatment in any manner whatsoever of disease or any ailment of the human body." Then over on page 906 of the Act, Section 2: "It shall not be lawful for any person in the State of Pennsylvania to engage in the practice of medicine and surgery, or pretend to a knowledge of any branch or branches of medicine and surgery, or to hold himself or herself forth as a practitioner in medicine and surgery, or to assume the title of Doctor of Medicine and Surgery, or doctor of any specific disease, or to diagnose diseases, or to treat diseases by the use of medicine and surgery as defined in this section 1 (d)" —that is the section 1 read before—"of this Act or by

any other means, or to sign any death certificate, or to hold himself or herself forth as able to do so, excepting those hereinafter exempted"—and those are cases with which we have nothing to do—"unless he or she has first fulfilled the requirements of this Act and has received a certificate of licensure from the Board, which license shall be properly recorded in the office of the Superintendent of Public Instruction at Harrisburg."

Now, as I see this case, it boils itself right down to the effect and scope of this license which was issued to Harvey Milton Allison back in 1914 by the Board of the Bureau of Medical Education and Licensure of the Department of Public Instruction for the State of Pennsylvania. I want to read to you a section from the case in the Superior Court, that is the Appellate Court, one of the Appellate Courts of this State, in the case of Commonwealth versus Allison. I should state that in this trial there was offiered in evidence in rebuttal for the purpose and for the sole purpose of attacking the credibility of the defendant as a witness, a record of conviction against this defendant in 1931 of practicing with medicine without a license. Also, offered in evidence for the sole purpose of attacking his credibility as a witness was a record of a conviction against this defendant in 1937 or 1938—I am not sure exactly what year—on a charge of practicing medicine without a license, and I want to read to you just a part of the case here in the opinion of the Appellate Court in the case of Commonwealth versus Allison. The reason I am reading this to you is that this same license was apparently introduced in evidence in that case because a reading of the license used in that case, which was in 1931, is identical with the reading of the license we have in this case. "Under such a license"—referring to this same license or a

license exactly similar—"the authority of the licensee is limited to the practice of the pursuit which is stated in the certificate of license. The Act makes a clear distinction between a license entitling one to practice medicine aud surgery, and a license entitling one to practice only special branches of medicine and surgery. The certificate of license which appellant held authorized him 'to treat the sick by herbs and massage' in a qualified manner to be referred to below. It did not authorize him to engage in the practice of medicine and surgery in its common and comprehensive sense, or to hold himself forth as a practitioner of medicine and surgery, or to assume the title of Doctor of Medicine and Surgery, or to diagnose diseases, or to sign a death certificate. It expressly provided that it did not authorize him to practice medicine by the use of drugs administered internally or applied externally and that it did not confer the right to apply any of the treatment authorized to be applied except upon the request of a person duly authorized to prescribe the same. It cannot avail him as a defense to the commission of the prohibited act of engaging in the practice of medicine and surgery without having obtained the necessary license. The burden was on the Appellant to produce a duly issued license authorizing him to practice medicine and surgery." I am not sure but what the burden is upon the Commonwealth to prove he did not have a license. I do not believe that burden shifts. However, I am not the Superior Court by a long ways. "He did not produce such a license." In this case, however, there is such a license produced. "This is but another case of a specialist in a minor branch of medicine and surgery attempting to gain the benefit of a license to practice a profession of medicine and surgery without possessing the qualifica-

tions fixed by the law. Such an effort is made at one's peril."

Now, under the definition of drugs, which I have given you, as any substance derived from animal, vegetable or mineral sources, and so forth, as I gave it to you before, if you find that this defendant did prescribe such drugs for Dr. Davis, or if you find and are convinced beyond a reasonable doubt that he did hold himself out as a doctor, a physician, of medicine and surgery, and you are convinced of these things, as I have said before, by evidence which convinces you beyond a reasonable doubt, then you may be justified in finding a verdict of guilty as indicted. This is a matter entirely for you to determine. You have seen the witnesses, you have heard their testimony, and you have your own impressions of that testimony as produced here by the Commonwealth.

This case is an important case, important to this defendant who is entitled to a fair trial at your hands, important to the Commonwealth, and important to the people of the Commonwealth, who are entitled to protection against one who is practicing medicine without being properly qualified and without being properly licensed to do so. So that it is not a case that you should brush off without giving it your most careful consideration.

We have heard some testimony and you have seen some exhibits with respect to the defendant's connection with a religious sect known as the Ohio Valley Christian Conference. We have no question, no quarrel, no dispute, with this defendant or any other person on their religion. We believe thoroughly that every man and woman is entitled to follow the type of religion that he

or she believes to be the type of their choice. We do not recollect any testimony in this case which would indicate that faith or spiritual healing entered into this case in any manner whatever. If the Court is wrong in that you, of course, will correct us. There was no testimony given by Dr. Davis, as I recollect it, it should be governed by your recollection.

You must not be sympathetic toward the defendant, nor must you be prejudiced against the defendant because his religion happens to differ with your religion. I think we are rapidly approaching the time when I expect you to respect my religion and I expect to respect your religion just to the same extent that I have a right to have you respect mine. There is an old saying that "All roads lead to Rome". I may be going one way and the defendant may be along another road and you still a third road, and I cannot say, however, that that enters into this case. However, that is a matter for you to determine.

I have tried to give you as careful instructions as I can on the case and I ask you to go to your jury room and render such a verdict as you believe will be an honest verdict and one which will satisfy your conscience and will carry out the duty which you owe to this defendant and the duty which you owe to the public. During your two weeks stay here in the Court House you must realize that you are the last buffer, at least before you get into the Appellate Court, between the defendant and the State, and you are the last line of defense, at least before you get into the Appellate Court, of the public against those who may be violating the law, so you have a duty not only to the public but a duty to the defendant to perform in this case or any other

case, and I am sure from your close attention in this case you are anxious, all of you, to perform that duty to the very best of your ability and perform that duty well.

The Court (to counsel):

Is there anything that either counsel would have me add?

Mr. Bielski:

I have some written points I would like to have the Court pass upon.

The Court:

The first point is affirmed and I think that has been covered.

"A physician is an individual licensed under the laws of the Commonwealth of Pennsylvania to engage in the practice of medicine and surgery in any or in all of its branches."

2. A physician is also a person skilled in the art of healing."

Can you show me any authority for that?

Mr. Bielski:

That is Gould's Medical Dictionary.

The Court:

I will have to refuse that point unless the Commonwealth has something to the contrary.

Mr. O'Brian:

That is the second one?

Mr. Bielski:

Yes, that is refused.

The Court:

I have to refuse the third point in the form as stated, because there you include examinations under the law by prayer and spiritual means.

Mr. Bielski:

May I amend that? "Except the art of healing by faith."

The Court:

Yes, we will amend that to read:

"The art of healing is the science of diagnosis and treating in any manner whatsoever of disease or any ailment of the human body, and the art of healing as referred to in this case specifically exempts healing by faith or prayer."

We will affirm the fourth point:

"That the use of herbs is a branch of medicine and the one who practices the same is a botanic physician."

Affirm the fifth point and do that in the face of that decision:

"The practice of herbs or the use of herbs is a separate branch of medicine and not related in any manner whatsoever with physiotherapy."

The sixth point will be refused.

The seventh point will be refused.

The eighth point is affirmed:

"If you find that the treatment offered Dr. Davis was by means of spiritual faith or prayer, it is specifically exempted from the Act and your verdict should be not guilty."

Mr. Bielski:

I would also ask the Court to charge the jury that the burden is upon the Commonwealth in this case and that there is no evidence that any drugs were used by Dr. Allison.

The Court:

I think that has been covered. I said we had no analysis here. I should also call to the attention of the jury the testimony with respect to the source of those

pills. That might have thrown some light on it if we could have found out where those pills came from.

The Court:

We will grant an exception unless you have something further to request.

Mr. Bielski:

Nothing, your Honor.

The Court (to the jury):

All right, members of the jury, you may take the case and render a verdict which you honestly believe to be a just one.

4. Dates of Judgment Below.

January 20, 1943,—VERDICT—that they find the defendant "Guilty", with recommendation of leniency, and so say they all.

November 30, 1943 — SENTENCE — Defendant sentenced to pay 6¼ cts. to the Commonwealth, pay costs and undergo an imprisonment of not less than six (6) months or more than twelve (12) months in the Allegheny County Workhouse and stand committed. Eo die, above sentence suspended on payment of costs of prosecution forthwith with sentence of six (6) months to twelve (12) months to Workhouse if there is any violation. Allowed forty-eight (48) hours to pay costs.

December 3, 1943 — SUPERSEDEAS — Superior Court Certiorari No. 162 April Term, 1944 and Bond in the sum of One thousand five hundred Dollars ($1,500.00) filed.

July 15, 1944—SUPERIOR COURT—Judgment affirmed.

September 23, 1944—SUPREME COURT — Order dismissing petition for allowance of appeal to Supreme

Court filed and recorded in the Prothonotary's Office for the Supreme Court, Pittsburgh, Pa.

5. Jurisdiction of Supreme Court of the United States.

The Constitution of the United States of America, Art. XIV, sec. 1, (inter alia) provides:

Sec. 1 * * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

6. Specification of Error.

1. The Supreme Court of the State of Pennsylvania erred in making an order dismissing the petition of Harvey M. Allison for allowance of Appeal to Supreme Court of Pennsylvania from the Superior Court of Pennsylvania.

2. The Superior Court of the State of Pennsylvania erred in affirming the judgment of the lower Court.

7. Constitution of the United States.

XIV Amendment to the Constitution.

8. Table of United States Cases Cited.

1. Coppage v. Kansas, 236 U. S. 1.

2. San Francisco Gas etc. Co. v. San Francisco, 189 Fed. 943.

3. San Bernardino County v. May, 1941, 117 P. 2nd 354 at 361.

4. Sims v. Rives, 84 F. 2nd 871 at 878.
5. Joseph S. Finch Co. v. McKutrick, 59 S. Ct. 256; 305 U. S. 395, at 397.
6. Ritchey v. Wells, 166 So. 817 at 818.
7. Howard Sports etc. v. Weller, 18 At. 2d 210.
8. Virginia v. Rives, 100 U. S. 313.
9. Missouri v. Dockery, 191 U. S. 170.
10. Ex parte Virginia, 100 U. S. 347.
11. Home Telephone Co. v. Los Angeles, Cal., 1918, 33 S. Ct. 312 227 U. S. 278.
12. Chicago R. Co. v. Chicago, 1897, 166 U. S. 234.
13. Scott v. McNeal, 154 U. S. 45.
14. Louisville R. Co. v. Bosworth, 250 F. 191.
15. Louisville R. Co. v. Railroad Commission, 191 F. 757.
16. Risley v. Utica (N. Y.), 173 F. 502.
17. Ho Ah Kow v. Nunan (Cal.), 5 Sawy., U. S. 552; 12 Fed. Cas. 6546.

9. **Pennsylvania Acts of Assembly.**

June 3, 1911, P. L. 639.
August 6, 1941, P. L. 903.
July 25, 1913, P. L. 1220.

10. **Table of Pennsylvania Cases Cited.**

1. Keene's Appeal, 64 Pa. State 268 (1870).
2. Shonk v. Brown, 61 Pa. State 320 (1869).
3. Western Massachusetts Insurance Co. v. Girard P. S. Co., 6 Pa. Superior Ct. 288 (1898).

11. **Miscellaneous Citation.**

Gould's Medical Dictionary.

J. HARRY PERSHING,
Attorney for Petitioner.